No. 2263

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United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. SYNNOTT, a Creditor, Individually, and as the Duly Authorized Attorney for, and Agent of ALEXANDER SEDGWICK and MERRILL K. GREEN,

Appellant,

vs.

THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED, Bankrupt, and A. L. GROW, as Trustee in Bankruptcy of THE TOMBSTONE CONSOLIDATED MINES COMPANY, Bankrupt,

Appellees.

Brief of Appellant.

ADAMS & BLINN,
AMOS L. TAYLOR,
DOAN & DOAN,
Counsel for Appellant.

PRESS OF GEO. H. ELLIS CO., BOSTON, MASS.

INDEX TO APPELLANT'S BRIEF.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Number 2263.

THOMAS W. SYNNOTT, PETITIONER, *Appellant*

vs.

THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD., ET AL., *Appellees.*

BRIEF FOR THOMAS W. SYNNOTT, APPELLANT.

STATEMENT OF PROCEEDINGS BELOW.

This is an appeal from the decree entered by the United States District Court for the District of Arizona on February 17, 1913 (Record, pp. 18, 19), confirming the order of the Referee in Bankruptcy disallowing the claims of this appellant to be allowed to prove as secured claims certain bonds issued by The Tombstone Consolidated Mines Company, Ltd., as more fully hereinafter appears. The petition for proof of these claims appears on pages 6 to 14, inclusive, of the record. The order of the Referee disallowing these claims appears on pages 3 and 4 of the record, and the petitioner's petition for review of said order by the said District Court appears on pages 1 and 2 of the record. The petition for proof of claim was brought

by the said Thomas W. Synnott for himself and as attorney for, and duly authorized agent of, Alexander Sedgwick and Merrill K. Green, the three constituting a committee to whom had been assigned all the bonds set out in the petition.

A petition for review was filed by the said appellant, asking the United States District Court for the District of Arizona to review the decision of the Referee pursuant to the Bankruptcy Act (Record, pp. 1 and 2), which was duly granted by the Referee (Record, p. 4). The District Court has entered a decree affirming the order of the Referee disallowing the said bonds (Record, pp. 18 and 19), and the Judge of the said District Court rendered a written opinion, stating his reasons therefor (Record, pp. 20–23, inclusive).

STATEMENT OF THE CASE.

The Tombstone Consolidated Mines Company, Ltd., was a corporation organized under the laws of the then territory of Arizona, and on August 10, 1911, was duly adjudicated a bankrupt in the District Court of the Second Judicial District of the then territory of Arizona (acting as a court of bankruptcy) upon an involuntary petition against it by certain of its creditors filed in said Court on July 18, 1911. On August 10, 1911, the said case was duly referred by said Court to Daniel McFarland, Esq., Referee in Bankruptcy, and A. L. Grow was on September 2, 1911, appointed Trustee of the property of said bankrupt.

The appellant here seeks to prove against the said bankrupt corporation, and have allowed as secured

claims, 461 Special-Contract-Bonds aggregating $439,-055, with interest, issued by said bankrupt, a copy of one of which is set out in the appendix hereof.

It appears that on July 16, 1901, the bankrupt entered into a contract with The Development Company of America, a corporation organized under the laws of Delaware with office at New York, N. Y., to raise large sums of money for the bankrupt to enable it to purchase and carry on its business, and that a second contract was entered into between these parties on December 14, 1901, to carry out that purpose, providing for a bond issue of $3,000,000 (being the bonds in question), for the record of the agreement and the copy of the bonds, and that the contract should bind and be for the benefit of the successors and assigns of the parties and should extend to and benefit the holders of any such bonds as assignees of said The Development Company. This contract and copy of bonds were duly filed and recorded on January 22, 1902, in the office of the County Recorder for the County of Cochise, in the State of Arizona, in book 6 of Miscellaneous Records at pages 45–62, inclusive. A copy of said contract and bond appears in the appendix hereof.

On the face of each bond there is a straight promise to pay the par value of the bond in gold coin, etc., at its face value, payable in twenty equal installments, represented by the coupons attached, "from and out of a retirement fund created from the net surplus earnings of the company as hereinafter stipulated at the times and upon the terms and conditions hereinafter stated, but not otherwise; also that the company

agrees to pay to the registered holder hereof, in like gold coin, from an interest fund created from the net surplus earnings of the company, as hereinafter stipulated and not otherwise, interest on the face value" at the rate of six per cent. in semi-annual payments. The bond then goes on to provide for place of payment, for the registration of the bond and its transferability. It then states, "Be it further known that the terms and conditions governing the payment of this bond and the payment of the installment coupons hereto attached and the interest thereon are endorsed on the back hereof and are hereby expressly made a part of this Agreement, as much so as if they were fully written on the face of this Bond."

On the back of the Bond, under the heading "TERMS AND PRIVILEGES OF SPECIAL-CONTRACT-BOND," there appear numerous provisions and stipulations:—

First. That the proceeds derived from the sale of the bonds shall be held and used for the purchase of property, real and personal, or a railway company, mining machinery, etc., the object being to provide a plant and working equipment.

Second. That out of the earnings of the company there shall be set aside an "Operating Fund" to carry on the business, an "Interest Fund" to pay interest on the bonds, and a "Retirement Fund" to be used to pay off the bonds as the various ones become due and payable.

Third. That the earnings of the company shall be applied, first to current expenses, next to installments of interest on the bonds in question, next to payment of dividends on stock of the company if the directors

so order, not exceeding four per cent., and all remaining earnings shall be transferred to the "Retirement Fund" to take up the coupons as above.

Fourth. That the company has a right to retire all bonds on any interest day by paying the face value with all accrued and unpaid interest.

Fifth. "In the event of liquidation or dissolution of the Company, all Bonds outstanding and unpaid shall be paid in full, both as to principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the Company to the holders of the stock of the Company."

Sixth. "It is further agreed that the Company will not execute, sign or deliver any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver, or other instrument which shall, subject to the terms and conditions of this Agreement, be prior to or in any way give a preference as against or over the rights of the holder of this Bond or of any other Bond of like issue."

Seventh. "It is expressly agreed and understood by the holder of this bond that the obligation hereby created is solely against the Company as such, and is only against the Retirement Fund created from the surplus earnings of the Company, as hereinbefore stipulated. Provided that in the event of liquidation or dissolution of the Company, the obligations of this Bond shall immediately extend and attach to all the Funds and other assets of the Company whatsoever, as in Clause V of this instrument, above stipulated and set forth. The Company further covenants and

agrees that the total bonds of this issue outstanding at any time and as a unit shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title to all the property of the Company, real and personal, and of every kind and nature, and for the enforcement thereof the Company hereby declares and acknowledges that it holds all its rights, interests, or title in and to any and all real and personal property, of every kind and nature whatsoever, now held or which may be hereafter acquired by it, subject to and in accordance with the aforesaid conditions, and that the Company has caused a copy of this special contract bond to be duly filed and recorded in the County of Cochise, Territory of Arizona, in which the properties of the Company are situate."

The Referee disallowed all these bonds as claims against the bankrupt on the ground as stated in the order that they "are only contingent liabilities and not fixed liabilities, evidenced by instruments in writing, absolutely owing at the time of the filing of the petition against said bankrupt" (Record, pp. 3 and 4). Apparently, he did not pass upon the question as to whether they were secured claims or not, basing his decision solely on the language quoted. The Judge of the District Court affirmed this order, and went further, holding in his opinion that said bonds did not constitute a lien upon the assets of said corporation (Record, pp. 20–23, inc.).

SPECIFICATION OF ERRORS.

The errors assigned (Record, pp. 25, 26) are in substance that the Court below erred in ruling:

1. That the bonds disclose no provision from which an intent to create a general lien may be inferred.

2. That the lien created by the bonds is limited to the surplus earnings of the bankrupt.

3. That the bonds were to be preferred only as against the stock in distribution of assets of the bankrupt.

4. That the bondholders are not entitled to the standing either of a general creditor or a lien holder under Section 63 of the Bankruptcy Act.

5. That the bonds do not constitute a fixed liability absolutely owing at the time of filing the bankruptcy petition.

6. That there is nothing in the seventh clause of the bonds, taken together with all the provisions of the bonds, which creates a general lien.

THE ISSUES RAISED.

The questions raised here may be for convenience, and except as hereinafter otherwise treated, grouped under three main headings:

I. Are these bonds provable in bankruptcy in this case?

II. If they are provable, are they secured or unsecured claims?

III. If the Court finds that the bonds in question are ambiguous and the real intention of the parties cannot be ascertained from the instruments themselves for that reason, extrinsic evidence should be offered to show the intention of the parties, their relations, and an opportunity to offer such evidence should be given.

ARGUMENT.

I.

The appellant contends that these bonds constitute provable claims in bankruptcy in this case.

1. The Bankruptcy Act Governs.

The law governing this question is found in Section 63 of the United States Bankruptcy Act, the material parts of which are as follows:

Section 63 (*a*): "Debts of the bankrupt may be proved and allowed against his estate which are

(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (4) founded upon an open account, or upon a contract, express or implied.

(*b*) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in

such manner as it shall direct, and may thereafter be proved and allowed against his estate."

2. Debt Owing Absolutely.

It is apparent that the debt must be one fixed and owing absolutely at the time when the petition was filed, and everything is considered as of that date.

See Collier on Bankruptcy, p. 853.
See *County Commissioners* v. *Hurley*, 169 Fed. 92.

"On that date the property of the bankrupt passes from his control to the court or its receiver and thence to the trustee. . . . Indeed the conditions at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property."

3. Debt Provable as Consequence of Bankruptcy.

"It is equally well settled, however, that a claim which was not due prior to the filing of this petition may become provable as a consequence of the filing of the petition. In such cases the debt and bankruptcy are coincident."

Loveland on Bankruptcy, Vol. 1, p. 598.

A breach of contract may result from the filing of the petition, and in such a case the claim for damages ripens simultaneously with the filing of the petition.

Collier on Bankruptcy, p. 854.
In Re Swift, 112 Fed. 315.

The bankrupts were stock brokers at Boston, Mass. They made an assignment for the benefit of their creditors, and were later adjudged bankrupts. The petitioner was their customer, and presented a proof of claim for balance due him on the account less value of stocks which he received back. The trustee contended that the account should be stated as of the time of the assignment. The bankrupt had agreed to deliver certain stocks to the petitioner upon the payment of the balance due. On appeal from the District Court it was decided by Putnam, J., that neither party fulfilled the ordinary conditions, neither made a demand or tender. Consequently, according to the ordinary rules of law no cause of action arose in favor of either party against the other. The position is one, therefore, to be solved by the law itself. The simple rule based on fundamental principles and traceable in the text-writers and decisions of the Courts for fully a century must be applied, to the effect that, "where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance." . . . It is maintained that, unless the voluntary assignment operated to ripen the claim, it was not ripened in season to become provable.

With reference to statutes on bankruptcy there are contingent demands and also engagements of such character that it remains uncertain whether they will give rise to an actual liability as to which there are no means of removing or valuing the uncertainty by any calculation. We have already seen that proceedings in bankruptcy rendered unnecessary a demand

and tender, and we must hold that this proof of debt relates to the time when they were commenced. From that time the stock in question was beyond the power of the stock brokers to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy as the consequence thereof in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already said. Consequently, by necessary effect there was created and existed, when the proceedings commenced, a provable claim.

In Re Pettingill & Company, 137 Fed. 143.

On page 146, Lowell, Circuit J., said, "For admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident. To some extent bankruptcy operates as a breach of the bankrupt's contract . . . where the creditor by seeking to prove, manifests his election to treat the contract as broken. The Court on bankruptcy may permit claims arising from such breach of contract which breach did not occur before bankruptcy but was caused constructively by the adjudication of bankruptcy itself. . . . It seems, therefore, that the text of provability under the Act of 1898 may be stated thus, If the bankrupt at the time of bankruptcy by disenabling himself from performing the contract in question and by repudiating his obligations could give the right to maintain, at once, a suit

in which damages could be assessed at law or in equity, then the creditor could prove in bankruptcy on the ground that bankruptcy is the equivalent of disenabling and repudiation." This was a guarantee of dividends on stock of a corporation, and it was held that future dividends not yet due were contingent liability.

In Re Neff, 157 Fed. 57.

The bankrupt made a promissory note payable at a time and place certain upon the surrender of certain stock. It was contended that this was not a provable claim, as it was made conditional upon the surrender of the stock at a future time, and was optional with the holder.

Lurton, Circuit J., held that the bankruptcy proceedings amounted to an out-and-out repudiation of the contract, and that it is sufficient if the claim becomes provable as a consequence of bankruptcy. The creditor by offering to file his proof manifests his election to treat the contract as broken.

In Re National Wire Corp., 166 Fed. 631.

In Re Duquesne Incandescent Light Company, 176 Fed. 785.

This was a contract to furnish burners at the rate of 35,000 per month from June to November, with 40,000 more in December The referee disallowed the claim.

Young, District J. Pa., overruled the referee, and allowed the claim on the ground that the filing of the petition in bankruptcy constituted a breach of the contract. This made the claim provable, although

unliquidated, and the parties submitted themselves and the referee liquidated it.

In Re National Wire Corp., 166 Fed. 631.

4. Provable Debt.

The term "provable debt" does not necessarily mean allowable debt, since there may be some bar or other reason which will appear at the trial to defeat the merits of the claim.

Collier on Bankruptcy, p. 853.

5. As to Form of Proof under Rules.

The fact that the proof of claim in the form as required by the rules of the Supreme Court of the United States states that the debt existed "at and before filing of the petition for adjudication of bankruptcy" of debts should not change this result, since the word "and" must be construed to mean either "or" or "and," as the facts may require.

Collier on Bankruptcy, p. 855.
In Re Swift, 112 Fed. 315.

6. Rule Apart from Bankruptcy.

Entirely apart from bankruptcy proceedings, it has been repeatedly held that, where one party to an executory contract prevents the performance of it or puts it out of his own power to perform it, the other party may regard it as terminated and demand what damages he has sustained thereby.

Lovell v. *St. Louis Mutual Life Insurance Company*, 111 U. S. 264.

This was a case where the policy provided that upon default of payment of premium the policy should not default, but the insured should have paid up value upon certain notices, etc. The company transferred all its assets to a new company, and Bradley, J., held that the insured had a right to consider this a determination of the contract immediately.

Ruehm v. *Harst*, 178 U. S. 1.

This was a contract for 100 bales of hops to be delivered 20 each month by a partnership. There was notice of dissolution, and it was held that after a notice of a renunciation of a continuing agreement the party is at liberty to consider himself absolved from any future performance, retaining his right to sue, which he may do immediately. "It is not disputed that if one party to the contract has destroyed the subject matter or disabled himself so as to make performance impossible, his conduct is equivalent to a breach although the time for performance has not arrived."

See also *Newcomb* v. *Brackett*, 16 Mass. 161, at 166.

7. Equitable Claims are Provable.

The debt to be provable need not be an action at law, as any equitable claim is sufficient and equitable principles govern courts of bankruptcy.

Collier on Bankruptcy, p. 855.
Loveland on Bankruptcy, p. 603.
In Re James, 131 Fed. 401,

where Putnam, Circuit J., held that a wife might recover a loan of the bankrupt, who was her husband,

without regard to its enforceability under the laws of the State, since the contract was a valid one in equity, by the principles of which Courts of Bankruptcy are governed.

In Re Peasley, 137 Fed. 190.

The creditor took a bond for a deed, then paid the full amount of the purchase price. No deed was given, and the vendor went into bankruptcy. The purchaser now seeks to have established a lien, and it was held by Aldrich, District Judge, to constitute an equitable lien. "The money was advanced by the vendee in reliance upon the bond. There is no question made against the proposition, and, whether it safeguarded the vendee's interest or not, he attempted to give notice of his interest to the world by having his bond recorded, and performance under the contract was suspended by the arm of the bankruptcy law." A resulting lien may exist from trust interests as may arise or result by implications of law.

8. Income Bonds are Provable.

Hence it is seen from the foregoing that the bondholders would have a valid, provable claim in this case, although the bond simply provided that the same was to be paid from income, namely, if the fifth, sixth, and seventh paragraphs did not appear at all, since by the filing of the petition in bankruptcy and the subsequent adjudication the bankrupt rendered it impossible for it to carry out the terms of the bonds, that is, to make any further income. On this ground

alone the petitioners ask that the claims be allowed as provable.

9. As to Liquidation or Dissolution.

But the petitioners do not have to rely solely upon the above doctrine because the bonds themselves expressly contain further provisions about when they shall become payable. The fifth paragraph on the back of the bonds expressly states that "in the event of liquidation or dissolution of the company all bonds" with interest shall be paid before any distribution.

It, therefore, becomes of interest to ascertain a meaning of the word "liquidation."

In *Midgett* v. *Watson*, 29 N. Carolina, 143, at 145, it was held that "liquidation" "is the act of settling, adjusting debts, or ascertaining their amounts or balance due . . . to liquidate an account is to ascertain the balance due, to whom due and to whom payable."

In *L. D. Garrett Company* v. *Murton*, 71 N. Y. Sup. 17, at page 19, it was held "in a general sense liquidation means the act or operation of winding up the affairs of the firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss."

In *Burr* v. *Williams*, 20 Ark. 171, it was held that the words "in liquidation" written on a partnership note meant that the firm was dissolved.

In *Richmond* v. *Irone*, 121 U. S. 27, it was held that the ordinary sense of liquidation is "to clear away."

With reference to the meaning of the word "dissolution" it has been held that the mere insolvency of a

corporation followed by a cessation of business with no intent to resume will not operate what is technically known as dissolution, but that such a condition of affairs will confer upon creditors practically the same rights as they would have under technical dissolution.

Lyons-Thomas Hardware Company v. *Perry Stove Manufacturing Company*, 86 Texas, 143.

This is exactly the situation in this case. What took place in so far as the rights of creditors are concerned, including these bondholders, fixes and determines the rights of all parties just as much as if there had been a technical dissolution upon the day of filing the petition.

10. Net Earnings not Requisite.

There is no occasion for an allegation in this proof that there were net earnings of the company which became applicable to pay the bonds in question, because by the adjudication in bankruptcy all obligations under the bonds were repudiated, and they became at once payable, as above seen. The cases cited in behalf of the trustee of said bankrupt are not in point.

Morse v. *Bay City Gas Company*, 91 Fed. 938,

was a suit in equity upon the bonds, and not a bankruptcy case at all. This case is significant upon the way equitable claims of this nature will be handled.

Likewise

Edwards v. *Bay City Gas Company*, 91 Fed. 946,

is a bill in equity for an accounting, and not a bankruptcy proceeding at all.

11. Consideration Need not be Alleged.

It had been argued in behalf of the trustee that the proof of claim here is insufficient, since the consideration paid for the bonds is not set out in full. On this point see

Loveland, Vol. 1, p. 693, 4th ed., as follows:

> "The proof of a debt evidenced by a promissory note which is attached as an exhibit is a sufficient compliance with the statute with respect to stating the consideration for the debt. A promissory note is *prima facie* evidence of consideration and an instrument under seal always imports a consideration."
>
> *Hayes* v. *Kile*, 8 Allen, 300.
>
> *Perley* v. *Perley*, 144 Mass. 104, at 107.

And again on page 694:

> "The holder of a promissory note or other negotiable paper who took it for value in good faith before maturity thereof need not state the consideration which he gave for it."

In the case of *Baumhauer* v. *Austin*, 186 Fed. 260, the consideration alleged in the proof of claim was

> "money loaned and advanced by the deponent at diverse times to said bankrupt evidenced by a certain promissory note executed and delivered to

this deponent . . . said note is hereto attached and filed herewith."

This was held to be a good proof.

12. Form or Sufficiency of Proof not now Open.

If it should be held that the proof of this appellant is not sufficient because the consideration is not set out or for any other defect in form, then the petitioners hereby request leave to amend their proof to make the necessary allegations as to the consideration for each bond. Sufficient time should be allowed for this, as there are a large number of bondholders to be consulted, and the facts ascertained as to each bond.

On the question of amendment see

Loveland, p. 694, *supra.*
In Re Stevens, 107 Fed. 243.
In Re Stevens, 104 Fed. 325.

However, the appellant here contends that the question of the sufficiency of this proof of claim as to form is not now open to the trustee, as it was not raised before the Referee, and the Referee's decision as contained in his order expressly states that the claims were disallowed as being contingent liabilities and not provable in bankruptcy (Record, pp. 3 and 4). Likewise this question was not passed upon by the Judge of the District Court.

13. Conclusions.

Our general conclusions, therefore, on this branch of the question are:

a. That this debt became due and payable simultaneously with the filing of the petition in bankruptcy.

b. That the filing of the petition in bankruptcy rendered it impossible for the bankrupt thereafter to fulfill its obligations under the bonds, and legally amounted to a repudiation of such obligations.

c. That such repudiation immediately gave the bondholders the right to bring suit upon the bonds and to have its damages assessed.

d. That such damages must be the face value of the bond with unpaid interest.

e. That the bonds themselves provide that in the event of liquidation or dissolution the bonds shall be paid before distribution, and this makes these bonds doubly provable.

f. That if the bonds had simply provided that they should be paid out of the earnings, without any lien or any right to share in distribution, they would be provable as unsecured claims.

g. Any questions as to the form or sufficiency of the proof of claim is not now open to the Trustee in Bankruptcy.

CONSEQUENTLY THESE BONDS ARE PROVABLE CLAIMS, AND MUST BE ALLOWED EITHER AS UNSECURED CLAIMS OR AS SECURED CLAIMS.

II.

The appellant contends that these bondholders have ~~secured~~ claims, and that the bonds must be allowed as such and paid before the general creditors are entitled to anything.

1. Entire Transaction to be Considered.

It is elementary that Courts of Equity will examine the entire transaction and ascertain what the parties really intended to do, and we should apply that rule to these bonds. They are elaborate in their nature and contain a great many provisions which would be entirely unnecessary if the bonds were simply to be paid from earnings without any lien, and the fact that these unnecessary provisions appear must be given great weight.

2. Terms of the Bonds.

The fifth clause on the back expressly states that the bonds are to be paid in full in the event of liquidation or dissolution before anything is paid to the stockholders. Then by the sixth clause it is agreed that the company shall not execute any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver or Other Instrument which shall . . . "BE PRIOR TO OR IN ANY WAY GIVE A PREFERENCE AS AGAINST OR OVER THE RIGHTS OF". . . the bondholders.

This is reiterated and made clear by the provision in the seventh clause that "THE OBLIGATION HEREBY CREATED IS SOLELY AGAINST THE COMPANY," etc., . . .

provided "IN THE EVENT OF LIQUIDATION OR DISSOLUTION OF THE COMPANY THE OBLIGATIONS OF THIS BOND SHALL IMMEDIATELY EXTEND AND ATTACH TO ALL THE FUNDS OR OTHER ASSETS OF THE COMPANY WHATSOEVER." And, further, that "THE TOTAL BONDS OF THIS ISSUE OUTSTANDING AT ANY TIME AND AS A UNIT SHALL BE DEEMED AND TAKEN . . . TO CONTROL THE TITLE TO ALL THE PROPERTY OF THE COMPANY, REAL AND PERSONAL, AND OF EVERY KIND AND NATURE, AND FOR THE ENFORCEMENT THEREOF THE COMPANY HEREBY DECLARES AND ACKNOWLEDGES THAT IT HOLDS ALL ITS RIGHTS, INTERESTS, OR TITLE IN AND TO ANY AND ALL REAL AND PERSONAL PROPERTY OF EVERY KIND AND NATURE WHATSOEVER NOW HELD OR WHICH MAY HEREAFTER BE ACQUIRED BY IT SUBJECT TO AND IN ACCORDANCE WITH THE AFORESAID CONDITIONS," and then states that a copy of the bond has been duly filed and recorded under the laws of Arizona.

Although this language does not expressly say that all the property of the corporation is held in trust to secure these bonds prior to everything else, yet the inference that such is to be the fact is so clear that a court of equity can find no other meaning, and it is fair to assume and infer from the language used that these bonds were sold by the bankrupt and The Development Company of America and purchased by the bondholders with the distinct understanding, belief, and intention that they had a first lien upon all the property of the corporation to secure the same.

3. Equitable Liens.

That equitable liens or mortgages are created and given force by the law is well settled where equity and justice and the intention of the parties so require.

Smith v. *Rainey*, 9 Ariz. 362.
Richardson, Trustee v. *Wren*, 11 Ariz. 395.
In Re Peasley, 137 Fed. 190.
Heller v. *The National Marine Bank*, 45 L. R. A. 438.

Here documents were issued called "preferred stock," and the court held that they were really bonds and constituted a first lien prior to unsecured creditors. "The substance of the thing was changed, the name was retained," and "public policy requires that men . . . shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice."

In 31 Ohio State, 116, the court said, "The question is such cases is not, 'What did the parties call it,' but, 'What do the facts and circumstances require the court to call it.'"

The bondholders here cannot be both creditors and stockholders. They are not stockholders in any event.

See *Warren* v. *King*, 108 U. S. 389.
See also *West Chester & Philadelphia Railroad Company* v. *Jackson*, 77 Pa. St. 321.

In 3 Hughes, 355, the court said that it "will con-

sider that as a lien which was so intended to be by the parties."

Tatten & Company v. *Tison*, 54 Georgia, 139.

In 25 R. I. 456 the court held that a recital in a bond that it is "secured by all the property and assets of the company" imports that the bonds are secured by some particular lien.

4. Bondholders not Stockholders.

It has been argued by the trustee that these bondholders are in effect preferred stockholders. Nothing further from the facts can be imagined. Technical words to create a bond are used. It is so styled, the holders have no voting power. We know of no case where bondholders have been held to be preferred stockholders, yet those who have been styled preferred stockholders have been held to be bondholders.

Special attention is called to clause five on the back of the bonds that

> "All bonds outstanding and unpaid shall be paid in full, both as to principal and accrued interest thereon, at the rate of six per centum per annum before any distribution is made of any of the assets of the Company TO THE HOLDERS OF THE STOCK OF THE COMPANY."

The parties have used the most significant language possible to designate these instruments as bonds, to differentiate them from stock, and to create all the rights incident to bonds and none incident to preferred stock.

5. Bonds duly Recorded.

By recording the contract executed between the bankrupt and The Development Company of America, which contained a copy of the bonds, the provisions of the local laws were fully complied with.

See Revised Statutes of Arizona, 1901, paragraphs 735, 748, 749, 3282, 3283, 3284.

There can be no question but that this contract with its annexed exhibits was a proper document for record.

Luke v. *Smith*, 227 U. S. 379.

But whether the recording was strictly legal or not it can make no difference. See

In Re Peasley, 137 Fed. 190,

cited at length under the seventh subdivision of the first point in this brief.

6. Trustee stands in the Shoes of the Bankrupt.

Further, there was no occasion to record the bond or to give notice to creditors, since the creditors are here represented by the Trustee in Bankruptcy, who stands in the shoes of the bankrupt, charged with full knowledge of all the facts with reference to these bonds.

Section 47 of the Bankruptcy Act as amended in 1910 cannot in any way apply to these bonds, since that amendment is not retroactive.

See Collier on Bankruptcy, 9th ed., p. 662.

Arctic Ice Mach. Company v. *Armstrong County Trust Co.*, 27 Am. Bankruptcy Reports, 562.

Consequently, it is not necessary to take up the questions raised by the trustee.

If there are any equities against the bankrupt, they must be taken just as strongly against the trustee. The trustee "stands in the shoes of the bankrupt."

In Re Sterne et al., 26 Am. Bankruptcy Reports, 535–540.

Generally see Collier on Bankruptcy, 9th ed., pp. 658 *et seq.*

7. Generally as to Proof of Claim by Secured Creditors.

See Collier on Bankruptcy, pp. 721 *et seq.*

It is not necessary that the creditor surrender his security.

In Re Medina Quarry Company, 179 Fed. 929.

In Re Davison, 179 Fed. 750.

If the claim is secured, it is the duty of the Referee to suspend the claim pending the determination of the value of the security in some proper tribunal, or, where the parties agree, to proceed to determine the value of the security himself. This value is fixed as of the date of filing the petition.

See Collier on Bankruptcy, p. 725.

Even where the creditor by mistake proves his claim as unsecured, the Court will afterward allow him to amend and prove as secured.

Collier on Bankruptcy, p. 727.

8. Interpretation of these Bonds.

The only thing that appears upon the bond itself which would in any way be said to prevent it from having a lien upon the property is the use of the words "as hereinbefore stipulated" in the seventh clause, and that these words referred to the provisions that the bond shall be paid only from the income, and therefore nullify all the language of the fifth, sixth, and seventh clauses. It would be noted that no such language appears in clauses five and six: therefore, the provisions of these two clauses must stand absolutely. Then in clause seven occurs this phrase. This must refer to the provisions of clauses five and six especially, and cannot in any way limit or make void the natural meaning of the words in clause seven. Any other interpretation must lead to the most unreasonable sophistry, such as a statement, "This bond is payable only from income and never from anything else." "This bond shall have a first lien upon all the property and assets of the company to secure its payment except as hereinbefore mentioned."

The second statement is, of course, absolutely contradictory to the first statement, and there can be no occasion for its use unless it was put in to deceive the public. We contend that the use of that qualifying phrase in clause seven can be reconciled with the idea of a lien as set forth below, but, if it cannot be reconciled with the idea of a lien, it should be entirely disregarded, because it, as a matter of law, shows an intention to deceive the public and obtain loans under false pretenses. A misleading, harmful, and fraudulent in-

terpretation will never be adopted if any other can be found.

Great stress was laid by the trustee upon the words "and not otherwise" as used in the bonds, but it should be noted that these words do not appear after the first three clauses of the terms and conditions. It is the fifth, sixth, and seventh clauses which really create the lien and upon which this appellant largely relies.

The face of the bond and the first three clauses provide for the payment both of interest and principal out of net earnings in the usual course of business, and these provisions constitute a unit by themselves; that is, they are to govern as long as the company remains solvent and does not liquidate or dissolve.

The fourth clause then creates the necessary machinery to enable the bankrupt to pay off a part or all of the bonds on any interest day, and it is significant that this clause is entirely silent as to whether the funds for that purpose are to be obtained from net income or otherwise, and it is beyond question that, if the bankrupt had desired to pay off these bonds by selling part of its assets or otherwise using its principal, it would have had full legal right to do so, in so far as anything in the bonds might control.

Then follow the fifth, sixth, and seventh clauses, which provide what shall happen in the event that the corporation becomes insolvent and liquidates or dissolves. There is nothing in any of these three clauses which is in any way inconsistent with the prior clauses or the face of the bond, and they together build up a consistent scheme to afford the bondholders ade-

quate protection. The first provision of this scheme is contained in clause five, providing that in the event of liquidation or dissolution both principal and interest are to be paid before any distribution is made of the assets to the stockholders. It has been argued that this meant that the stockholders were to get no income until the bonds were paid, but the language "any of the assets" must include all the assets of the corporation. This clause then clearly puts the bondholders ahead of all the stockholders under the present conditions.

Then follows the sixth clause, which goes one step further to protect the bondholders, and provides that the company will not execute any instrument which shall be prior to, or give a preference as against or over, the rights of the bondholders. The object of this seems to be to prevent the possibility of creating any liens which will be prior to the bondholders either by way of subsequent bond issues, issues of preferred stock, creating secured creditors, or otherwise. It should be remembered that this bond containing this provision was duly recorded, and notice was given to the world and to all possible future creditors that the bondholders had a first claim. Again, the contention of the trustee that this clause simply prevented the company from placing prior liens upon the income is untenable. There is no such language used in the clause, and coming after clause five clearly supplements it. The words "subject to the terms and conditions of this agreement" must mean all its terms and conditions, and not simply those contained in the first three clauses. If this clause was inserted simply to prevent prior liens

being placed upon the income only, it would have been entirely unnecessary and mean nothing, since the first three clauses clearly fix the rights of the bondholders as to these earnings, and give the prior lien.

Next follows the seventh clause, which seems to be a conclusion of the whole bond. The first phrase, down to the words "provided that," summarizes the face of the bond and the first three paragraphs; that is, as to the payments from income when there is no liquidation or dissolution. Then follows the rest of this clause, limiting the first phrase, and providing what shall happen further upon liquidation or dissolution with an elaboration of the rights of the bondholders as set out in the fifth and sixth clauses, by creating a trust fund controlled by these bondholders and upon which they have a first lien to secure the payment of their bonds, thereby providing adequate machinery for the bondholders to protect their rights.

Upon liquidation the obligation shall immediately extend and attach to all the property. In what possible way can any obligation attach to property without becoming a lien upon it? Again, it provides that the company holds all its rights, interests, and title, etc., subject to and in accordance with the above provisions. This either means that the company holds its property as any person holds property, subject to all the ordinary rights, duties, and liabilities, or it means that it holds its property in trust for the benefit of the bondholders. If the first supposition is true, the language means absolutely nothing, and is worse than useless because it is exceedingly misleading. The only logical construction is the latter one; namely, that it holds its property

in trust for the benefit of the bondholders, thereby perfecting and carrying out the provisions just before that, that the obligation shall extend and attach to all of the property. But, if there were any doubts about these matters, they are entirely removed by the provision that the bonds shall be deemed and taken to control the title to all the property. What possible meaning can this have except by way of a lien? The bondholders were not stockholders in any manner and have no voice or vote in the management of its affairs. There is no possible way known to the law whereby they could control the title to the property except by way of a lien upon it. Any other result must be directly contrary to all the language used and violate the manifest intention of the parties.

The position taken by the trustee here seems to be astounding. It is beyond the realms of reason to believe that these bonds would be purchased if they were to be paid only from income, and especially in the case of an unknown corporation organized for mining purposes. We ask the Court to take judicial notice as to the impossibility to sell such a bond issued by such a company. The inference must be that all parties interested intended that the bonds should have a first lien upon all the assets in such a situation as now exists.

We have already seen that the trustee stands in the shoes of his bankrupt, and gets no better title or right than it had. Every consideration of equity and justice requires that it be determined that these bonds have a first equitable lien upon all the assets of the corporation. The fact that they amount to as much

as they do is only an added reason why a gigantic attempt on the part of a few general creditors to get the assets of this corporation away from the bondholders should not succeed, and especially so since the parties behind this movement are the very ones who were instrumental in floating and selling these bonds.

9. Conclusions.

Consequently, the appellant submits that these bondholders have a first lien upon all the assets of said bankrupt, and requests the Court to reverse the finding of the District Court, and send the matter back there for proper proceedings.

As another conclusion, if it should be determined that the bonds themselves payable from income are a contingent liability, the contention under the first subdivision of this brief is not necessary for the allowance of the proof here under this division of this brief, since here it is seen that the bonds are payable not from income, but, under present conditions, from all the assets without any contingency.

III.

If the Court should be of the opinion that these Special-Contract-Bonds on their face disclose a contract for the payment of bonds from income and are extremely ambiguous as to the question as to whether they are payable out of principal under present conditions, then this appellant contends that, since there is ambiguity as to the meaning of these bonds, oral

evidence should be received by the Court to show the real intention of the parties under well-known principles of law.

Union Bank v. *Hyde*, 6 Wheaton, 572.
Mechanics Bank v. *Bank of Columbia*, 5 Wheaton, 326.
Atkinson v. *Cummins*, 9 Howard, 479.
Jennie Lind Co. v. *Bower*, 11 Calif. 194.
Peish v. *Dickson*, Fed. Cases No. 10911.
Cole v. *Wendel*, 8 Johnson, 116.
McKee v. *DeWitt*, 12 N. Y. App. Div. 617.
Titchenell v. *Jackson*, 26 W. Vir. 460.
Ganson v. *Madigan*, 15 Wis. 144.
Meyers v. *Maverick*, 26 So. West. 716.
Fish v. *Howard Admrs.*, 21 Wend. (N. Y.) 651.
Roberts v. *Short*, 1 Texas, 573.
Bell v. *Martin*, 18 N. J. Law, 167.

1. Such Evidence should be Received.

This has been the position of these appellants throughout, but they have been denied the opportunity to offer any such evidence up to this time. The proofs of claim were duly filed with the Referee, who in a very short time disallowed them at an *ex parte* hearing without giving these appellants any opportunity to be heard either on questions of fact or law, and the first that these appellants knew that their proofs of claim were coming up for hearing was notice of the order disallowing them.

After the petition for review of the order of the

Referee had been filed in the United States District Court for the District of Arizona, a bill in equity was filed by certain of the bondholders, to wit, George R. Blinn, Jesse P. Lyman, and Edwin Chapman, executors of the will of Amos F. Adams, late of Newton, Mass., deceased, against the said The Tombstone Consolidated Mines Company, Ltd., and its Trustee in Bankruptcy and others, to enforce a lien under certain of these bonds pursuant to said contract (which were not offered for proof in bankruptcy), alleging that it was the intention of the parties to create a first lien upon all the assets of said corporation under conditions such as now exist. This petition was brought in behalf of the plaintiffs in said bill and for all other bondholders who might take advantage thereof. This petition is still pending. This bill is put out in full in the appendix. Immediately after it was filed, a request was made of said District Court to await the determination of the matters in said petition for review until the hearing upon said bill in equity, that they might be heard and decided together and that evidence might be offered, either orally or by deposition, to show the real intention of the parties and to explain any apparent ambiguity in said bonds.

2. Request to Introduce such Evidence Made Below.

Notwithstanding this request, however, and before the pleadings were completed on said bill in equity, the District Court Judge assigned for hearing the said petition for review with others for December 23, 1912.

Briefs were duly filed with him with certain requests, and among others it was especially requested as follows:

"We have requested the continuance that the question of the allowance of these claims may be heard, at the same time with the Bill in Equity already filed to establish and foreclose the lien as claimed. This proceeding will determine the value of the property and enable the court to ascertain for how much the bonds should be proved.

Further, there is considerable evidence, both oral and written between the parties showing the intention of the corporation and its agents to constitute these bonds a first lien. All this will be shown at the hearing."

And, again, a further request was made as follows:

"The petitioners again renew their request that the determination of this whole matter be postponed until a hearing upon the bill in equity brought by the executors of the will of Amos F. Adams now on file. They contend that whether these bonds are provable or not they create a common law lien which equity must acknowledge and enforce. Much evidence can be produced upon the general subject of the intention of the parties, their conduct and estoppel which might be of great value upon the questions raised by these proofs of claim. The rights of the bondholders should be determined once and for all and upon one proceeding."

This request was likewise made orally in Court by counsel, correspondence and otherwise, but was never granted, and no opportunity to this day has ever been given the appellant to produce this evidence.

3. Outline of Such Evidence.

That this Court may have before it the true situation, it seems proper to state in this brief an outline of some of this evidence.

The Development Company of America, a corporation organized under the laws of the State of Delaware, entered into a contract with the said Tombstone Consolidated Mines Company, Ltd., to sell these Special-Contract-Bonds, which contract was duly recorded under the laws of the State of Arizona. The contract is annexed to this brief in the appendix as Exhibit A to the bill of complaint. The Development Company of America itself and through agents in New York City proceeded to advertise widely the sale of these bonds throughout New York, Massachusetts, and elsewhere, and caused to be printed and distributed a circular stating that said bonds were secured by properties which had produced over $30,000,000 from the surface to an average depth of 500 feet, and that the title to said property should in effect be with such bondholders ratably until such bonds should have been retired with interest; and, as a result of this and other like statements, the bonds in question were sold to the persons named in the proof of claim, mostly people of small means and widely scattered. The sales were made for the full value of the bonds, and

on the explicit representation that the bonds gave a first lien upon all the assets under conditions like those now existing. That those now claiming to be largely interested as general creditors, whose claims have been allowed, are:

Empire Trust Co., 42 Broadway, New York, N. Y.	$621,182.36
The Development Company of America, 11 Pine Street, New York, N. Y.	48,241.01
Thomas W. Joyce, 23 Wall Street, New York, N. Y.	1,752,431.68
James Douglass, New York, N. Y.	12,358.10
F. M. Murphy, Prescott, Ariz.	74,450.00
Total	$2,508,663.15

That all the foregoing had some active part in the sale of said bonds, either as officers or agents of said bankrupt, fiscal agents, or otherwise, and that the same counsel who acted for the above creditors in proving their claims has acted in the interests of the trustee in this proceeding.

4. Doctrine of Estoppel Applies Here.

In other words, the very people who brought about the sale of these bonds and have profited largely thereby, either directly by way of commissions or indirectly through the bankrupt company, and who made the misrepresentations and misled the public (if our contention as to the bonds constituting the liens is

not correct) are now forever estopped by their contract from denying that said bonds constitute a lien or from asserting adverse claims. All creditors and persons claiming under the bankrupt stand in the shoes of the bankrupt and in no better position.

Pomeroy on Eq. Jur., 3d ed., p. 1415, etc., and p. 1439.

Bigelow on Estoppel, 5th ed., p. 459, etc., p. 556, etc.

Central Railroad Co. of N. J. v. *McCartney*, 68 N. J. Law, 165, where Mr. Justice Pitney wrote the opinion.

Soward v. *Johnson*, 65 Mo. 102.

Story's Eq. Jur., 13th ed., Vol. 1, p. 207 (note).

Railway Company v. *Jones*, 73 Miss. 110.

Goodenow v. *Ewer*, 16 Cal. 461.

Mattoon v. *Young*, 45 N. Y. 696.

Nickerson v *Mass. Title Ins. Co.*, 178 Mass. 308.

Lincoln v. *Gay*, 164 Mass. 537.

5. Conclusion.

Of course, this line of procedure must depend upon the introduction of evidence, and it is for this reason that we have asked an opportunity to offer evidence. If the Court feels that there is any serious doubt as to whether these bonds do give these bondholders a first lien under present conditions, then we ask that the whole matter be sent back to the District Court

with instructions to hear this evidence and such other along these lines as may be proper, that the rights of the bondholders may be fairly and fully determined with reference to all the circumstances of the case.

Respectfully submitted,

ADAMS & BLINN,
AMOS L. TAYLOR,
DOAN & DOAN,
Counsel for the Appellant.

APPENDIX.

(Copy of Bill in Equity.)

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

GEORGE R. BLINN, JESSE P. LYMAN, and MERRILL K. GREEN, executors of the will of Amos F. Adams, *Plaintiffs* *v.* THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD., and A. L. GROW, Trustee in bankruptcy of the property of said The Tombstone Consolidated Mines Company, Ltd., and THE DEVELOPMENT COMPANY OF AMERICA, *Defendants.*	**In Equity. Number**

BILL OF COMPLAINT.

To the Judges of the United States District Court for the District of Arizona:

George R. Blinn, Jesse P. Lyman and Merrill K. Green respectfully represent, allege, complain and say, as follows:

First. That the said George R. Blinn is a resident of Bedford, the said Jesse P. Lyman, a resident of Ashby, both in the County of Middlesex and the said Merrill K. Green is a resident of Boston, in the County of Suffolk and all in the Commonwealth of Massachusetts and that all said parties carry on and have a usual place of business at said Boston and all are citizens and residents of said Commonwealth and they bring this bill of complaint against The Tombstone Consolidated Mines Company Ltd., a corporation duly organized under the laws of the territory of Arizona and now existing under the laws of the State of Arizona and having its office and principal place of business at Tombstone within said State and being a citizen and resident thereof; and

A. L. Grow of Arizona, a citizen and resident of said State of Arizona; and

The Development Company of America a corporation duly organized and existing under the laws of the State of Delaware having its principal office in the City of Dover in said State of Delaware and with an office and doing business in the city, county and State of New York and a citizen and resident of said State of Delaware.

Second. That upon information and belief on or about December 14, 1911 the said The Tombstone Consolidated Mines Company, Ltd., made and executed with the said Development Company of America a certain contract in writing, a copy of which is hereto annexed and marked Exhibit A and made a part hereof and may be referred to for any and all provisions thereof and that the said contract was duly

filed and recorded with the records of the County of Cochise in the State of Arizona on January 22, 1902 at 9 A.M. in Book 6 of miscellaneous records at pages 45–62 inclusive.

Third. That upon information and belief said Development Company prior to the execution of said contract, marked Exhibit A, had agreed to furnish The Tombstone Consolidated Mines Company, Ltd., with large sums of money, the exact amount being unknown to the plaintiffs, to be used by it for the purpose of developing certain mines within the State of Arizona and to carry on its business and that said agreement in writing, marked Exhibit A, was executed pursuant to and is a part of said agreement and to provide a means by which the said Development Company of America might be able to raise funds for that purpose.

Fourth. That upon information and belief said agreement in writing, marked Exhibit A, provided, among other things, that the said The Tombstone Consolidated Mines Company, Ltd., should issue and deliver a series of Special-Contract-Bonds not exceeding, in the aggregate par, the sum of $3,000,000 to be in the form described in said agreement which bonds, it had been agreed between said parties, the said Development Company of America should sell in various denominations to the public and that pursuant to said agreement the said The Tombstone Consolidated Mines Company, Ltd., did issue and the said Development Company of America did sell to the public and to a great many persons said bonds mentioned in said agreement, marked Exhibit A, to

the par value of about $3,000,000, the exact amount being unknown and among others did issue and sell one of said Special-Contract-Bonds of the series mentioned in said agreement, marked Exhibit A, of the par value of $5000, dated July 31st, 1902 to Amos F. Adams of Newton in said County of Middlesex and said Commonwealth, a copy of which is hereto annexed and marked Exhibit B and may be referred to for any and all provisions thereof.

Fifth. That the said Amos F. Adams died on or about January 4, 1911 leaving a will which was duly proved and allowed by the Probate Court for said County of Middlesex on or about February 17, 1911 and on said date the said George R. Blinn, Jesse P. Lyman and Merrill K. Green were duly appointed executors of said will and are the duly qualified and acting executors and as such are the present holders and owners of said bond for $5000 issued to the said Amos F. Adams as aforesaid and all rights thereto, therein and thereunder.

Sixth. That said contract in writing and said bond, among other things, provides:

> "In the event of liquidation or dissolution of the Company, all Bonds outstanding and unpaid shall be paid in full, both as the principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the Company to the holders of the stock of the Company."

and in the event of such liquidation or dissolution, "the obligations of this Bond shall immediately ex-

tend and attach to all the Funds and other assets of the Company whatsoever."

"Clause VI. It is further agreed that the Company will not execute, sign or deliver any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver, or other instrument which shall, subject to the terms and conditions of this Agreement, be prior to or in any way give a preference as against or over the rights of the holder of this Bond or of any other Bond of like issue."

Seventh. That upon information and belief the event of liquidation or dissolution of said The Tombstone Consolidated Mines Company, Ltd., has arrived in that on or about August 10, 1911 it was duly adjudicated a bankrupt by the District Court of the Second Judicial District of the Territory of Arizona having and exercising jurisdiction under the United States Bankruptcy Laws and that on or about September 2, 1911 the defendant A. L. Grow was duly elected and appointed trustee in bankruptcy of the property of said corporation and is the duly qualified and acting trustee of such property and that on or about September 22, 1911 the said Grow as trustee, as aforesaid, was duly authorized to continue the business of the said corporation and has been carrying on the same to liquidate and wind up its affairs pursuant to the laws of the United States of America with reference to bankruptcy.

Eighth. That, upon information and belief, at the time of such adjudication in bankruptcy the said bankrupt owned real estate situated at or near Tomb-

stone in the County of Cochise and then territory of Arizona and now the State of Arizona a large number of lots of land, mines and mining claims as per schedule and description thereof hereto annexed and marked Exhibit C which may be referred to for any and all items and descriptions thereof.

Ninth. That upon information and belief, at the time of such adjudication in bankruptcy the said bankrupt owned personal property situated at or near Tombstone, in the County of Cochise and then territory of Arizona and now State of Arizona as per schedule and description thereof hereto annexed and marked Exhibit D which may be referred to for any and all items and descriptions thereof and that all the same is located upon the real estate described in the preceding paragraph hereof.

Tenth. That, upon information and belief, it was the intention and purpose of the said The Tombstone Consolidated Mines Company, Ltd., and The Development Company of America when said contract marked Exhibit A was executed and said bonds issued thereunder, including the plaintiffs' bond, that, in the event of the adjudication in bankruptcy of said The Tombstone Consolidated Mines Company, Ltd., or any other like proceeding, all holders of said Special-Contract-Bonds should have a first lien upon all the assets of said corporation, both real estate and personal property, for the payment of said bonds and that said bonds were sold by the said The Development Company of America and said bankrupt and by persons claiming by, through or under them, or either of them, upon representations that the holders of said

bonds, including the plaintiffs' said bond, would have such first lien ratably and that it was advertised, especially by the fiscal agent of the said The Development Company of America, that said bonds were secured by properties which had produced over $30,000,000 from the surface to an average depth of 500 feet and that the title to the said property should in effect be with such bondholders at all times until said bonds should have been retired with interest.

Eleventh. That, upon information and belief, since the issuance of said Special-Contract-Bonds and especially the plaintiffs' said bond, the said The Tombstone Consolidated Mines Company, Ltd., has incurred certain indebtedness amounting to large sums of money, considerably in excess of $1,000,000 either through the said The Development Company of America or otherwise and that the holders of such indebtedness, as creditors of said bankrupt are now represented by said trustee in bankruptcy, who was the Secretary and Treasurer of said bankrupt and who now seeks, in the interests of such unsecured creditors, to prevent the application of the assets of said bankrupt to the payment of said Special-Contract-Bonds, including the plaintiffs' said bond.

Twelfth. That by the terms of said bond the said The Consolidated Mines Company, Ltd., on the date of its said adjudication in bankruptcy owed the plaintiffs, as executors as aforesaid, the principal sum of said bond to wit: Five thousand (5000) dollars together with interest at the rate of 6 per cent. per annum from its date, July 31st, 1902, and the said corporation

still owes these plaintiffs as executors as aforesaid the said amount of said bond together with interest thereon to this date in full and that by the terms of said bond the said Adams as registered owner thereof would have had, had he survived, and the plaintiffs, as executors of the will of said Adams now have a first lien for the payment thereof both as to principal and interest as aforesaid, including any interest which may hereafter accrue on said bond, upon all the funds and assets of said bankrupt whatsoever and wherever situated both real estate and personal property including all the real estate, personal property, rights and privileges as hereinbefore described and that these plaintiffs are entitled to have said assets applied to the payment of their said bond.

Thirteenth. That, upon information and belief, the only way that said property of said bankrupt may be reached and applied to the payment and satisfaction of said bond is by an order of this Honorable Court for the sale and disposition of the said assets and property or so much thereof as may be necessary to pay the plaintiffs' claim as aforesaid under the process of this court; that the plaintiffs have no plain, adequate and complete remedy at law in the premises and that they bring this bill for the benefit of themselves to realize upon said bonds as hereinbefore described and any and all other bonds of said series which they may now or hereafter own and also for the benefit of all other holders and owners of said Special-Contract-Bonds of the same series as aforesaid who may desire to intervene and become parties to these proceedings.

Fourteenth. That said Contract marked "Exhibit A" was executed and inured for the benefit of the holders of any of said bonds of the series above described as assignees of said The Development Company of America and that all the terms and conditions of such agreement in writing and of said bonds are binding upon all persons claiming under said The Tombstone Consolidated Mines Company, Ltd., and said The Development Company of America.

WHEREFORE the Plaintiffs pray as follows:

First: That the Plaintiffs' claim against the said The Tombstone Consolidated Mines Company, Ltd., under and pursuant to the bond, a copy of which is hereto annexed and marked "Exhibit B" may be established in the sum of five thousand dollars with interest at six per cent. from July 21st, 1902, and that the Plaintiffs recover the same as damages with their costs and that the process of this Court issue therefor.

Second: That the Plaintiffs' claims against the said The Tombstone Consolidated Mines Company, Ltd., under and pursuant to any and all other of the said bonds of the same series as the one mentioned in the last prayer which the Plaintiffs now or hereafter may own may be established in accordance with the terms thereof with interest and that the plaintiffs recover the amount thereof as damages with costs and that the process of this Court issue therefor.

Third: That it be decreed that the Plaintiffs have a first lien upon all the funds, assets and property of said The Tombstone Consolidated Mines Company, Ltd., to secure to them the payment of all sums of

money due them under the said Special-Contract-Bond and any and all other like bonds which they may now or hereafter own, ratably with all other like bondholders who may join in these proceedings.

Fourth: That the plaintiffs may have a foreclosure of such lien, and to that end that this Honorable Court may order a sale of all the funds, assets and property of said The Tombstone Consolidated Mines Company, Ltd., or so much thereof as may be found necessary, under the process of this Court, to obtain sufficient funds to pay the plaintiffs' said claims and the claims of all other like bondholders who may join herein.

Fifth: To the end therefor that the defendants may if they can show why the plaintiffs should not have the relief herein prayed for, that they under oath individually and by their proper officers and according to the best and uttermost of their knowledge, remembrance and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter written as they are required to answer, that is to say:

Did the said The Tombstone Consolidated Mines Company, Ltd., and said The Development Company of America enter into an agreement in writing on or about July 16th, 1901, whereby the said The Development Company of America bound itself to furnish and pay to said The Tombstone Consolidated Mines Company, Ltd., certain moneys in exchange for the issuance and delivery of the series of Special-Contract-Bonds hereinbefore described and if so, annex and set forth the full complete and entire terms and conditions thereof.

Sixth: And for as much as the Plaintiffs have no adequate relief except in a Court of Equity and to the end that the Defendants may if they can show why the Plaintiffs should not have the relief herein prayed for that the defendants make under oath, according to their best and uttermost knowledge, remembrance, information and belief individually full, direct, true and perfect answers to all and singular the premises and to the several matters hereinbefore set forth and charged as fully, completely and particularly as if severally and separately interrogated as to each and every of said matters and that they and especially the defendant, A. L. Grow, may be compelled to render an account of all and singular the property, estate, goods and chattels of said The Tombstone Consolidated Mines Company, Ltd., now in his hands and possession, in so far as may be necessary for the purposes hereof.

Seventh: May it please your Honors to grant unto the plaintiffs a writ of subpœna out of and under the seal of this Honorable Court directed to these defendants commanding them on a day certain to appear before this Honorable Court and make answer to this bill of complaint and to perform, stand to and abide such orders and decrees as may be held against them under the penalties of the Law in such cases made and provided.

Eighth: For such other and further relief as to this Honorable Court may seem meet and as justice and equity may require.

United States of America
Commonwealth of Massachusetts } ss.
County of Suffolk,

I, George R. Blinn, one of the plaintiffs above-named make oath and say that I have read the foregoing Bill of Complaint subscribed by me and know the contents thereof and that the same is true of my own knowledge, except as to matters therein stated to be upon my information and belief, and as to these matters I believe them to be true.

(Sd) Geo. R. Blinn

Subscribed and sworn to Before me
this Twelfth day of December, a.d. 1912.

(Sd) Amos L. Taylor
Notary Public.

CONTRACT.

EXHIBIT A (attached to Bill in Equity).

This Agreement, made and entered into this fourteenth day of December, 1901, by and between The Tombstone Consolidated Mines Company, Ltd., a corporation duly organized under the laws of the Territory of Arizona, (hereinafter referred to as the Tombstone Company) having its principal office in Prescott Ariz., Party of the First Part, and The Development Company of America, a Corporation duly or-

ganized under the laws of the State of Delaware, (hereinafter referred to as The Development Company) having its principal office in the City of Dover, State of Delaware, and its principal place of doing business in the City of New York, State of New York, Party of the Second Part

WITNESSETH, That.

WHEREAS, the Tombstone Company has by purchase become and now is the owner and holder of certain option contracts for the purchase of, and for mining leases on, certain mines and mining locations, together with mining machinery and other property and improvements connected therewith, and situate in the Tombstone Mining District, Cochise County, Arizona, which are more fully described and set forth in a list thereof which is attached hereto, marked "Exhibit A" and made a part hereof, and *and*

WHEREAS heretofore, to-wit:—on the 16th day of July, 1901, a contract was entered into by the terms of which the Development Company, bound itself to furnish and pay to the Tombstone Company, certain moneys; and, as a part of the consideration expressed in said contract, the Tombstone Company became bound to authorize and has authorized the execution, issuance and delivery of a Series of Special-Contract-Bonds, (hereinafter referred to as Bonds), not to exceed, in the aggregate at par, the sum of three million dollars ($3,000,000), which bonds, so authorized, were and are to be in the form and to contain the terms, privileges and considerations set forth in a copy thereof which, with its coupons attached, is attached

hereto, marked "Exhibit B" and made a part of this Agreement.

Now, Therefore, in consideration of One Dollar in hand paid, by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and in consideration of the premises and of the reciprocal rights and benefits accruing and to accrue to the parties hereto and to their assigns hereunder, it is agreed by and between the Tombstone Company and the Development Company, as follows:

Clause I. That each and every clause of the copy of the bond hereto attached, marked "Exhibit B," and made part of this agreement, is hereby affirmatively adopted and made part of this agreement as fully and as completely as though they were written on the face hereof at full length.

Clause II. It is further agreed that, for the protection and benefit of all present or future holders of said bonds or any of them, that this agreement, together with its Exhibits, shall be recorded and spread upon the public records of Cochise County, Territory of Arizona.

Clause III. It is further agreed that this contract shall bind and benefit the successors and assigns of the respective parties hereto and shall extend to and benefit the holders of any of the bonds of the Series of Special-Contract-Bonds above mentioned and described, as assignees of the Development Company.

In Witness Whereof The Tombstone Consolidated Mines Company, Ltd., and The Development Company of America have caused their corporate names to be signed hereto, respectively, by their proper officers, and their respective corporate seals

to be hereunder affixed in duplicate, on the day and year first above written.

THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED,

By F. M. MURPHY, *Vice Pres't.*
And by HENRY M. ROBINSON, *Secy.*
[SEAL] *Party of the First Part.*

THE DEVELOPMENT COMPANY OF AMERICA

By E. H. HOOKER, *Vice Pres.*
And by JNO. B. LEAKE, *Secy.*
[SEAL] *Party of the Second Part.*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On the 14th day of December in the year nineteen hundred one, before me personally came Henry M. Robinson and Frank M. Murphy, to me known, who being by me duly sworn did depose and say that he the said Henry M. Robinson resided at Wick Avenue in the City of Youngstown, State of Ohio; that he the said Frank M. Murphy resided in the City of Prescott, Territory of Arizona; that he the said Frank M. Murphy is the Vice President and he the said Henry M. Robinson is the Secretary of The Tombstone Consolidated Mines Company, Limited, the corporation described in and which executed the above instrument, as Party of the First Part; that he the said Frank M. Murphy and he the said Henry M. Robinson knew the seal of said corporation; that the

seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Executive Committee of said corporation and that they signed their names thereto by like order.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Chas. E. Hunter,
Notary Public in New York
County, New York.

[Seal]

State of New York
County of New York ss.

On the 14th day of December in the year nineteen hundred one, before me personally came Elon H. Hooker and John B. Leake, to me known, who being by me first duly sworn did depose and say that he the said Elon H. Hooker resided at #118 Riverside Drive, in the City of New York, State of New York; that he the said John B. Leake resided at 119 West 95th Street, in the City of New York, State of New York; that he the said Elon H. Hooker is the Vice President and he the said John B. Leake is the Secretary of The Development Company of America, the corporation described in and which executed the above instrument, as Party of the Second Part; that he the said Elon H. Hooker and he the said John B. Leak knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Executive Committee of said corporation and that they signed their names thereto by like order.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Chas. E. Hunter
Notary Public for New York
[Seal] *County, New York.*

"EXHIBIT A" (attached to Contract).

First: An option for the purchase of the property formerly belonging to the Grand Central Mining Company, and now standing in the name of Martyn Bonnell, consisting of:

Alkey	Shorty
Hidden Treasure	Maine
Last Chance No. 2	Mexican
Silver Thread	Revenue
Chance	Contact
Standard	Triple Ex
Moonlight	Emerald
Naumkeag	Grand Dipper
Extacy	Brother Jonathan

Grand Central

The Cocopah Mining Claim
The Central Mining Claim
The Lowell Mining Claim
The North Point Mining Claim
The Boss Mining Claim

Those two certain dwelling houses, three small houses, one stable building, assay office, shop, boiler house, and one hoisting engine partly erected, situated upon the Grand Central Mine.

One dwelling house, one shaft house and one hoisting engine, situated on the Maine Mine.

One shaft house, one hoisting engine and boilers and three small houses situated on the Emerald Mine.

One shaft house with engine and boiler, situated upon the Silver Thread Mine.

One engine and boiler, one shop and one ore house, situated upon the Chance Mine.

One boiler house with boiler, situated upon the Boss Mining Claim.

One thirty stamp Quartz Mill, situated on the San Pedro River, near the town of Fairbank, known as the Grand Central Mill.

All the tools, lathes and old machinery now on the dumps and upon the property hereinbefore described.

Second: An option for the purchase and lease of the claims formerly owned by The Tombstone Mining and Milling Company, now standing in the name of Waldrum J. Cheney, consisting of certain mining claims located in the Tombstone District, a list of which is as follows, to wit:

Way Up	Defense
Gilded Age	East Side
Mountain Maid	Tribute
Goodenough	East Side No. 2
Toughnut	Lucky Cuss
Girard	McCann
North Sulphuret	Owl's Nest
West Side	The Owl's Last Hoot

and two others.

Third: A contract of option and lease on certain property owned by The Contention and Consolidated

Mining Company, consisting of certain mining claims located in the Tombstone District, as follows, to-wit:

Contention Claim
Flora Morrison
South Sulphuret,
and one other.

Fourth: A contract and option of purchase of certain property owned by the Head Centre and Tranquility Mining Company, consisting of that part only of certain mining claims located in The Tombstone District as follows, to wit:

Tranquility
Head Centre
Yellow Jacket
Fortuna

which lies below a horizontal plane 470 feet below the collar of the Tranquility shaft.

Fifth: A contract of option and lease on certain property owned by The Empire Mining and Milling Company consisting of certain mining claims located in the Tombstone District as follows, to wit:

Empire Claim

Sixth: A contract of option and lease on certain property owned by The Contentment Mining and Milling Company, consisting of certain mining claims located in the Tombstone District.

Seventh: An option for the purchase of the Vizina Claim, located in the Tombstone District.

Eighth: An option for the purchase of the Poor Claim, located in the Tombstone District.

"EXHIBIT B" (attached to Contract).

(Copy of Bond.)

No. Amount,

Total authorized issue Special-Contract-Bonds not to exceed at par $3,000,000 Capital Stock $15,000,000. —Corporation of Arizona.

The Tombstone Consolidated Mines Company Limited.
"Exhibit B." Special Contract Bond.

Know all men by these presents; That The Tombstone Consolidated Mines Company, Limited (hereinafter referred to as the Company) a corporation duly organized and existing under the laws of Arizona, has by a resolution of its Board of Directors authorized the issuance and sale of a series of Special-Contract-Bonds, which shall not exceed, at par, the aggregate sum of Three Million Dollars ($3,000,000) and shall be numbered consecutively from one (1) upwards, and be of like terms and tenor, except as to their respective amounts. The holders of said Special-Contract-Bond, or any of them, shall have the same rights in all matters relating to payment of interest or of the principal of said Bonds, without priority or preference. The principal of each Bond shall be divided into twenty equal parts and be represented by a like number of coupons thereto attached.

Be it Further Known, that for value received, the Company hereby agrees to pay to the registered holder of this Special-Contract-Bond, which is of the above series and issue, and is of the par value of

Dollars, the face value hereof in Gold coin of the United States of America, of the present weight and fineness, or its equivalent, and is payable in twenty equal installments represented by the attached coupons, from and out of a Retirement Fund, created from the net surplus earnings of the Company as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated, but not otherwise; also that the company agrees to pay to the registered holder hereof, in like gold coin, from an Interest Fund created from the net surplus earnings of the Company, as hereinafter stipulated and not otherwise, interest on the face value of this Bond or so much thereof as may from time to time remain unpaid, at the rate of six per centum per annum payable semi-annually in equal installments on the first days of January and July in each year before any dividends are paid on the stock of the Company. All payments of principal, interest and dividends are to be made by the Company at its office in New York City, Prescott, Arizona, or at the office of The Manhattan Trust Company in New York City.

Be it Further Known, that this Bond has been duly registered in the name of the holder by the duly authorized Registrar and Transfer Agent of the Company; that this Bond is negotiable, but is transferable only by the registered holder or by a duly authorized attorney, on the books of the Company as kept by its Transfer Agent, and such transfer similarly noted on this Bond.

Be it Further Known, that the terms and conditions governing the payment of this Bond, and the

payment of the installment coupons hereto attached, and the interest hereon, are endorsed on the back hereof and are hereby expressly made a part of this Agreement, as much so as if they were fully written on the face of this Bond, and that this Special-Contract-Bond shall not be valid or obligatory for any purpose until the Certificate endorsed on the back hereof, has been duly signed by the Registrar of the Company.

In Witness Whereof, The Tombstone Consolidated Mines Company, Limited, has caused this Special-Contract-Bond to be signed by its

President and

Secretary, and its corporate seal to be hereunto affixed, and the annexed coupons to be signed by its Treasurer, this day of 190 .

President.

Secretary.

(On inside of bond.)

Terms and Privileges of Special Contract Bond.

This Special Contract Bond (hereinafter referred to as Bond), as well as all others of the same series, is authorized, sold and issued by the Tombstone Consolidated Mines Company, Limited, (hereinafter referred to as the Company), and has been purchased and accepted by the holder hereof, for himself and assigns, subject to the following terms and conditions; that is to say;

Clause I. The net proceeds derived from the sale of this and other Bonds of the same issue, shall be held

in the Treasury of the Company, or be strictly applied by the Company to the purchase of any or all of the properties and mining claims at Tombstone, Arizona, now under contract by it; and independently or with some separate company organized for such purpose, to the cost of construction, maintenance, or control of a railroad to be used in connection with said properties, or to the purchase of stock or bonds in such a railroad company, all as the Board of Directors of the Company may or may not deem advisable; and to the acquisition of such other mining claims and properties as the Company may decide to secure; and to the purchase, installation and maintenance of suitable mining and milling machinery, for the development and operation of all such properties, as are now under contract, or hereafter may be acquired or controlled, in connection with the business of the Company, and to all legitimate and reasonable expenditures in connection therewith; or for any other purpose or object, for which the Company was incorporated, whenever such expenditures shall have been first approved by the Company, and for such other purpose or object only.

Clause II. Out of the earnings of the Company the Board of Directors or Executive Committee shall create and maintain certain special funds for the particular uses and held under the particular names as hereafter in this clause set forth, to wit:

(*a*) An Operating Fund, for carrying on the current business of the Company, which, in the opinion of the Board or Committee, shall be sufficient for such purpose, but shall not exceed at any one time the sum of Three Hundred Thousand ($300,000) Dollars.

(*b*) An Interest Fund, which, in the opinion of the Board or Committee, shall be sufficient to promptly meet and pay the semi-annual interest payments on all Bonds outstanding and unpaid, but which fund shall not exceed at any one time the sum of Ninety Thousand ($90,000) Dollars; it being hereby expressly agreed and understood that no payment of interest is promised or shall be made hereunder, except from and out of the Interest Fund, in this Clause named, and that said Fund shall be created and maintained solely from the surplus earnings of the Company as herein set forth and not otherwise.

(*c*) A Retirement Fund, from which shall be paid, from time to time, the installment coupons attached to all Bonds issued and sold, and to which shall be transferred all net surplus earnings of the Company not required for the creation and maintenance of the special funds hereinbefore named, or for the payment of dividends upon the stock of the Company, which stock dividends shall not be cumulative, and shall not exceed four per centum per annum, until such time as all Bonds issued by the Company shall have been paid and redeemed.

Clause III. The earnings of the Company under the supervision and within the judgment and discretion of the Board of Directors or Executive Committee, shall be used, paid and applied for the following purposes, but only in the order herein in the clause stated; that is to say;

(*a*) All current expenses of the Company shall be paid or provided for, and the Operating fund at all times be kept as nearly unimpaired as the earnings of the Company will permit.

(*b*) All earnings yet remaining shall be used and applied to the payment of all interest installments, due on all Bonds outstanding and unpaid, and to keep the Interest Fund for such purpose at all times as nearly unimpaired as the earnings of the Company available for such purpose will permit.

The interest on this, and all other Bonds of like issues, shall be cumulative and shall be payable semi-annually, on the first days of January and July of each year, at the rate of six per centum per annum on their par value, or any unpaid portion thereof. Should the surplus or net profits arising from the business of the Company and available for the Interest Fund herein named according to the terms of this agreement, prior to any interest day, be insufficient to pay the interest then due on this and other Bonds of the same series, such interest shall be payable from future profits available for and in such Fund, and no dividend shall at any time be paid upon the stock of the Company, until the full amount of interest at the same rate of six per centum per annum, up to that time, upon the par value of all Bonds, outstanding and unpaid, shall have been paid or set apart for payment.

(*c*) All earnings of the Company yet remaining may, within the discretion of the Board or Committee, be used in the payment of dividends on the stock of the Company, but at a rate of not to exceed four per centum per annum, which stock dividends shall not be cumulative, and shall not exceed the limit herein named until all Bonds issued and outstanding with accrued interest, shall have been fully paid, as herein provided.

(*d*) All earnings of the Company still remaining shall be transferred to the Retirement Fund, and whenever the cash on hand in said Fund shall equal one-twentieth of the face value of all Bonds then outstanding and unpaid, the Company shall promptly pay and retire one of the installment coupons of this Bond and one of the installment coupons of all other Bonds of this series then outstanding and unpaid.

Whenever a sufficient sum shall have accumulated in said Retirement Fund for such purpose, written notice thereof shall be promptly mailed to all registered holders of outstanding Bonds, according to the last address given and shown by the books of the Company, and the sums necessary to retire one installment coupon on each of the said outstanding Bonds, shall be deposited with the Manhattan Trust Company of New York City, or with its successor or successors in the trust (hereinafter called the Trust Company), in trust for and subject to the order of each of such registered holders, and each of such installment coupons shall be paid, upon presentation and surrender, at the offices of The Trust Company; and interest upon so much of each of said Bonds as the amount deposited will redeem and pay, shall cease from and after ten days subsequent to the mailing of said notice. Upon surrender of said coupons, they shall be cancelled by the Trust Company, and the payment thereof shall to such extent constitute a payment of this and other outstanding Bonds of the same series and issue.

All monies so deposited for the payment of such coupons shall be held by The Trust Company at the risk of the holder of this and other like Bonds, from

and after the expiration of ten days subsequent to the mailing of such notice. The Company in lieu of depositing such funds with the Trust Company as herein provided, shall have the right, upon the giving of proper written notice, to make direct payment of such coupons out of the Retirement Fund of the Company, at its office in New York City or Prescott, Arizona, and with like effect, as if paid through the Trust Company.

The determination of the Board of Directors or Executive Committee with reference to the application, use, distribution and payment of the earnings of the Company as in this clause indicated, when made in good faith, shall be conclusive and binding upon the holders of all Bonds, issued, outstanding and unpaid.

Clause IV. The Company reserves the right to retire all Bonds, issued and outstanding, at any interest paying date after June 1st, 1902, by the payment of the full face value of such Bonds, together with all accrued and unpaid interest at the rate of six per centum per annum up to such time. Provided, the Company shall not exercise this right of redemption as to any number of Bonds less than the whole number then issued, outstanding and unpaid. Provided, further, that notice of the Company's desire to retire such Bonds shall be mailed to the registered holder of the same at least thirty days before the interest date fixed for such retirement; also that the Company has deposited at the same time with the Trust Company, at its offices in New York City, or holds for such specific purpose in the Retirement Fund of the Company, a sufficient sum to meet and pay all of the said Bonds,

or any amount remaining due thereon. After such date, if such notice shall have been given and if a sufficient deposit of money has been made, or is so held, as herein required, such notice and deposit or holding shall constitute a full payment of this Bond, and of all other bonds of like issue and all interest thereon from such time shall cease; and the money so placed with the Trust Company, or held in the Retirement Fund of the Company, shall thereafter be held at the risk of the holder of this, and of all other Bonds of like issue.

Clause V. In the event of liquidation or dissolution of the Company, all Bonds outstanding and unpaid shall be paid in full, both as the principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the Company to the holders of the stock of the Company.

Clause VI. It is further agreed that the Company will not execute, sign or deliver any Mortgage, Deed of Trust, Conveyance, Lease, Release or Waiver, or other instrument which shall, subject to the terms and conditions of this Agreement, be prior to or in any way give a preference as against or over the rights of the holder of this Bond or of any other Bond of like issue.

Clause VII. It is expressly agreed and understood by the holder of this Bond that the obligation hereby created is solely against the Company as such, and is only against the Retirement Fund created from the surplus earnings of the Company, as hereinbefore stipulated. Provided that in the event of liquidation or dissolution of the Company, the obligations of this Bond shall immediately extend and attach to all the

Funds and other assets of the Company whatsoever, as in Clause V. of this instrument, above stipulated and set forth. The Company further covenants and agrees that the total Bonds of this issue outstanding at any time and as a unit shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title to all the property of the Company, real and personal, and of every kind and nature and for the enforcement thereof the Company hereby declares and acknowledged that it holds all its rights, interests or title in and to any and all real and personal property, of every kind and nature whatsoever, now held or which may be hereafter acquired by it, subject to and in accordance with the aforesaid conditions, and that the Company has caused a copy of this Special-Contract-Bond to be duly filed and recorded in the County of Cochise, Territory of Arizona, in which the properties of the Company are situate.

Clause VIII. This Bond is authorized, sold, issued purchased and accepted upon the terms and conditions hereinbefore stated, and none other, and no officer, agent, or other representative of the Company shall have the power to waive or modify any provision or condition of this Agreement, or to add any other provision or condition thereto.

(Attached to Bond.)

INSTALLMENT COUPON OF THE TOMBSTONE CONSOLIDATED MINES COMPANY, LIMITED.

No.

This Coupon is one of twenty coupons of like term and tenor and represents one twentieth of the prin-

cipal of Special-Contract-Bond No. to which it, with the other nineteen coupons thereto belonging is attached. Payment hereof will constitute a payment of one twentieth of said Special-Contract-Bond as provided by the terms hereof.

Payment of this Coupon in the sum of Dollars will be made by the Tombstone Consolidated Mines Company, Limited, from the Retirement Fund of said Company created in the manner and applicable to the payment hereof as per the terms and conditions stipulated in the attached Bond and not otherwise. Payment hereof will be made only upon its surrender and cancellation at the office of the Company in New York City, Prescott, Arizona, or at the office of the Manhattan Trust Company in New York City according to and upon notice given to the registered holder of the Special-Contract-Bond to which it is attached informing the holder that the amount hereof is held or has been deposited for the payment and redemption of this coupon all as provided in said Special-Contract-Bond.

Treasurer.

ENDORSEMENT.

THIS IS TO CERTIFY, that the within Special-Contract-Bond is one of the series and issue authorized by The Tombstone Consolidated Mines Company, Limited, and is of the par value of Dollars; that the par value of this Bond when added to the par value of all the Special-Contract-Bonds of said series and issue heretofore

issued, sold and outstanding, does not exceed the total sum of Three Million ($3,000,000) Dollars, and that the same has been duly registered in the name of the owner and such registration properly noted hereon.

AMERICAN FINANCE & TRUST COMPANY.

By

Registrar.

DATE OF REGISTRY	IN WHOSE NAME REGISTERED	TRANSFER AGENT

Filed and recorded at request of H. Gray Jan. 22, 1902 at 9:00 A.M., in Book 6 of Miscellaneous Records at pages 45 to 62 inclusive.

STATE OF ARIZONA, }
COUNTY OF COCHISE. } ss.

I, Owen E. Murphy, County Recorder in and for the County and State aforesaid, DO HEREBY CERTIFY that I have compared the annexed and foregoing copy with the original Agreement between THE TOMBSTONE CONSOLIDATED MINES COMPANY, Ltd., and THE DEVELOPMENT COMPANY OF AMERICA, filed for record in my office on the 22nd day of Jan. 1902, at 9:00 A.M., and recorded in Book 6 of Miscellaneous records at pages 45 to 62 inclusive, and that the same is a full, true and correct copy of said original and of the whole thereof.

Given under my hand and seal of office this 26th day of August, A.D. 1912.

OWEN E. MURPHY
County Recorder.

RECORDER
[SEAL]
Cochise County, Arizona.

NOTE.—Exhibit B attached to Bill in Equity was copy of bond there sued upon, and is not included here.

EXHIBIT C (attached to Bill in Equity).

SCHEDULE OF REAL ESTATE BELONGING TO THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.

List of lots of land in the City of Tombstone, Cochise County, Arizona. The names preceding numbers of

lots being names of mining claims upon which said lots are situated:

Gilded Age:	Lots 17, 18, 19, 20, 21, 22, 23 and 24, in Block 6, part of lot 23, Block 5, being 40 feet off S. E. end.
Way Up:	Lots 17 to 24, inclusive, Block 8.
Silverbelt:	Lots 1, 2, 23 and 24 in Block 25.
Silverbelt:	Lots 2 to 9, inc., and 16 to 19, inc., in Block 24.
Banner:	Lot 1; lots 5 to 13, inc., and 16 to 20, inc., in Block 38.
Banner:	Lots 5 to 9 inc., Block 50.
Banner:	Lots 5 to 14, inc., and lots 19 and 20, in Block 51.
Banner:	Lots 4 to 24, inc., in Block 65.
Empire:	Lots 9, (part of), 10, 11, 12, 13, 14, 15 and 16, Block 8.
Empire:	Part of lot 15 and all of lots 16 to 22, both inclusive, in Block 23.
Empire:	Lots 1 to 9 inc., in Block 9.
Empire:	Part of lot 19, and all of lots 20, 21, 22 and 23 in Block 24.
Vizina:	Lots 1 to 10, inc., in Block 8. Lots 9 and 10 in Block 18.

Value of same, with improvements, said to be $25,000.00

List of mines and mining claims, located in Cochise County, Arizona, with book and page where patent is recorded, Deeds of Mines, and where patent is not recorded, or claims are not patented, where location

notice is recorded in Records of Mines, in the office of the County Recorder of Cochise County, Arizona.

ADDIE	Lot 61	Tran. Record of Mines, 421, Book 7; Tran. R. M. 1–490;
ALKEY	Lot 43	12 Deeds of Mines, 261;
ALTA	Lot 109	7 Deeds of Mines, 405;
AUNT SALLY		Tran. Records of Mines, 7–47 and Book 1, R. M. 523;
BANNER	Lot 185	15 Deeds of Mines, 386;
BON TON		Tran. Records of Mines, 1–209;
BOSS	Lot 191	14 Deeds Mines, 594;
BLUE MONEY	Lot 81	15 Deeds Mines, 458;
BUFFALO		32 R. M. 254;
BIG COMET		5 Records of Mines, 472;
BROTHER JONATHAN	Lot 153	8 Deeds of Mines, at page 530;
BUCKSKIN		29 Records of Mines, 179;
C. O. D.	Lot 215	15 Deeds of Mines, 108;
COCOPAH	Lot 82	6 Deeds of Mines at page 440;
CONTENT	Lot 69	15 Deeds of Mines, 297;
CONTENTMENT	Lot 68	15 Deeds of Mines at page 300;
CONTACT	Lot 175	9 Deeds of Mines, p. 536;
CONTENTION	Lot 37	Tran. D. of M. 3–394;
CORNELL		22 Records of Mines, 471;
CHANCE	Lot 187	11 Deeds of Mines, 550;
CENTRAL		Tran. R. of M. 6–662;

Defense	Lot 88	14 Deeds of Mines, 289;
East Side	Lot 89	14 Deeds of Mines, 272;
East Side Number 2	Lot 124	14 Deeds of Mines, 278;
Emerald	Lot 157	8 Deeds of Mines at page 600;
Empire	Lot 46	11 Deeds of Mines, 76;
Extacy	Lot 77	8 Deeds of Mines, 87;
Escondido		9 Records of Mines at page 205;
Eulah		5 Records of Mines, 272;
Flora Dora		15 Records of Mines, 562;
Flora Morrison	Lot 74	8 Deeds of Mines at page 177;
Fortuna		Tran. Rec. of Mines, 1–391;
First South Extension Toughnut		5 Deeds of Mines, 1;
Grand Central	Lot 42	5 Deeds of Mines, 24;
Grand Dipper	Lot 148	8 Deeds of Mines at page 606;
Girard		5 Deeds of Mines, 1;
Gilded Age	Lot 52	9 Deeds of Mines, 34;
Goodenough	Lot 87	14 Deeds of Mines, 311;
Hard Up	Lot 120	Tran. Rec. of Mines, 1–260;
Hawkeye		Tran. R. of M. 3–437 and 14 R. M. 52;
Heral	Lot 83	15 Deeds of Mines, 261;
Head Center		Tran. R. of M. 1–249;
Horn Silver		9 Records of Mines, 426;
Hidden Treasure	Lot 172	11 Deeds of Mines, 556;

Houghton		22 Records of Mines, 470;
Last Chance #2	Lot 194	11 Deeds of Mines, 553;
Little Wonder		Tran. R. of M. 3–436 and R. M. 52;
Lucky Cuss	Lot 40	14 Deeds of Mines, 295;
Lowell	Lot 189	12 Deeds of Mines, 615;
Maine	Lot 154	8 Deeds of Mines, 540;
May Flower	Lot 190	15 Deeds of Mines, 360;
Mexican	Lot 176	9 Deeds of Mines, 541;
Michigan		22 Records of Mines, 472;
Miners Dream		11 Records of Mines, 237;
Moonlight	Lot 177	11 Deeds of Mines, 543;
McCann		Tran. R. of M. 3–763;
Naumkeag	Lot 44	9 Deeds of Mines, 17;
Narrow Gauge		12 Records of Mines, 137;
North Point	Lot 193	12 Deeds of Mines, 568;
New Year	Lot 58	9 Deeds of Mines, 260;
North Extension of the Sulphuret		1 Tran. Records of Mines, 415;
Ninety Nine		15 Records of Mines, 65;
Oregon		14 Records of Mines, 753;
Owl's Last Hoot		Tran. Records of Mines, 1–260;
Owl's Nest	Lot 97	14 Deeds of Mines, 319;
Poor X	Lot 66	4 Deeds of Mines, 3;
Prompter		1 Transcribed Records of Mines, 241;
Protection		14 Records of Mines, 528;
Revenue	Lot 159	11 Deeds of Mines, 24;

Shorty	Lot 80	8 Deeds of Mines, 93;
Silver Belt	Lot 186	15 Deeds of Mines, 382;
Silver Plume	Lot 65	9 Deeds of Mines, 497;
Silver Thread	Lot 183	11 Deeds of Mines, 564;
San Rafael		3 Tran. R. of M. 252;
Southern Belle	Lot 199	1 Tran. Records of Mines, 275;
South Extension of the Grand Central		7 Deeds of Mines, 100;
Sulphuret	Lot 48	5 Deeds of Mines, 8;
Survey	Lot 95	14 Deeds of Mines, 304;
Survey	Lot 103	7 Deeds of Mines at page 334;
Sydney	Lot 139	1 Tr. Records Mines, 296;
San Pedro		3 Tr. Records Mines, 731;
South Extension of the Sulphuret		3 Tr. Records Mines, 780;
Standard	Lot 192	11 Deeds of Mines, 547;
Telephone	Lot 214	15 Deeds of Mines, 103;
Tranquility	Lot 49	3 Deeds of Mines, 563;
Tribute	Lot 90	14 Deeds of Mines, 325;
Toughnut	Lot 41	14 Deeds of Mines, 263;
Triple Ex	Lot 152	8 Deeds of Mines at page 536;
Verde	Lot 204	12 Deeds of Mines 265;
Vizina		Amended Tran. Records Mines, 2-616;
Way Up	Lot 53	5 Deeds of Mines, 396;
Wedge	Lot 123	14 Deeds of Mines, 258;

West Side Yellow Jacket	Lot 91	14 Deeds of Mines, 283; Transcribed Records of Mines, 1–248.

Note.—The Hawkeye and Little Wonder appear to be merged in one claim, amended location of which is of record Book 14 R. of M. at 52.

Also all that certain lot or parcel of land situate in the City of Tombstone, said County of Cochise, described as follows:

Commencing at the Southwest corner of Fremont and Fifth Streets in said City, and running thence Southerly along the West side line of said Fifth Street eighty feet; thence Westerly at right angles to said Fifth Street sixty feet to the Easterly side line of Lot No. 8, in Block No. 18, said City; thence Northerly along the Easterly side line of said lot 8, thirty feet; thence at right angles to said last named line Easterly sixteen feet; thence at right angles and parallel to said Fifth Street Northerly twenty feet to the Southwest corner of the adobe house situated on the West side of lot No. 9 of the aforesaid Block No. 18; and thence Northerly along the East side of said adobe house about 30 feet to the Southerly side line 44 feet to the place of beginning, being part of lots 9 and 10 in said Block 18, and the same premises which John Reilly of said City, by his deed bearing date the 17th day of April, 1895, and recorded in the Recorder's Office at said City of Tombstone, on May 3, 1895, in Book 12, Deeds of Real Estate, page 91, granted and conveyed to the Tombstone Mill and Mining Com-

pany, all courses and distances being the same, more or less.

Also that portion of the Mexican grant of land known as San Juan de las Boquillas y Nogales on the San Pedro River in the said County upon which is built and situated the quartz mill of the Grand Central Mining Company with a frontage of 40 rods on said river on either side, Northerly and Southerly of said quartz mill, and running Easterly from in a river to the Easterly boundary of said grant, that is 80 rods frontage on said river, and running with the same width Easterly to the Eastern boundary line of said grant, with the said quartz mill in its entire Eastern and Western line.

Also commencing on the South side of Fremont Street in said City of Tombstone, at the Northeast corner of Lot No. 8, of Block 18 and running thence South along the East line of said lot 8, 50 feet; thence at right angles East 16 feet; thence at right angles North 50 feet to the South side of said Fremont Street; thence West along said South line 16 feet to the place of beginning, being the Westerly 16 feet front by 50 feet deep of lot 9 of Block 18 of said City of Tombstone.

All of the foregoing described mining claims, and tracts of property, with the improvements and buildings on the same (exclusive of the E. B. Gage house, which is owned by the Development Company of America), said to be valued at $1,000,000.00

EXHIBIT D (attached to Bill in Equity).

SCHEDULE OF PERSONAL PROPERTY BELONGING TO THE TOMBSTONE CONSOLIDATED MINES COMPANY, LTD.

Machinery and equipment at pump shaft including steam plant, hoisting machinery, compressed air plant, electric light plant, machine shop, carpenter shop, blacksmith shop, with tools and machinery complete for general mine and repair work; also pumps and piping in pump shaft and extra pumps on surface for tracks, oil and water tanks, etc., said to be valued at	$250,000.00
Hoisting machinery and boilers at following shafts and values:	
West Side	7,200.00
Tribute	2,000.00
Silver Thread	7,200.00
Tranquility	3,600.00
Lucky Cuss	6,000.00
Silver Plume	6,000.00
Comet	2,700.00
State of Maine	1,000.00
Oregon	350.00
Defense	1,000.00
Forty stamp mill, etc..	50,000.00
Railway equipment and trackage including one 16-ton Davenport saddle tank locomotive, and three 10-ton bottom dump carts, said to be worth	30,000.00

Office fixtures	$500.00
Surveying instruments and equipment	500.00
Assaying apparatus and supplies	750.00
Warehouse stock in warehouse or stored near pump shaft consisting of hardware, tools, pipe and fittings, nails, lumber, and general mine supplies	15,000.00
Fuel Oil on hand	3,000.00
Total	$386,800.00

All of the above property (personal) is located upon the land of said corporation hereinbefore set forth and all the above values are stated upon information and belief.